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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Implementation of  
Commission's Equal  
Employment Opportunity Rules

MM Docket No. 94-34

COMMENTS OF CBS INC.

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## SUMMARY

In its recent Notice of Inquiry, the Commission seeks comments on the effectiveness of its Equal Employment Opportunity (EEO) policies, rules and procedures and on certain proposals to change them in various respects. CBS Inc. (CBS") fully supports the Commission's EEO goals and believes that, as a general matter, the Commission's current policies, rules and procedures are both effective and sufficient.

CBS submits, however, that provisions of the Commission's recently adopted EEO forfeiture guidelines can lead to unfair and arbitrary results when applied in several specific sets of circumstances. The Commission's new guidelines appear to indicate that forfeitures, and in some cases short term renewals, will be imposed on licensees where they fail to have "adequate" representation of minority and female applicants in the applicant pools for specified percentages of job vacancies. CBS agrees that the Commission's focus on minority and female presence in applicant pools, and on a licensee's recruitment efforts, is appropriate where a licensee's record in hiring minorities and women raises questions as to the effectiveness of its EEO program.

But where a licensee has a demonstrably good record in hiring women and minorities -- for example, where its hiring or overall employment profile approaches parity with the

relevant workforce -- it is unfair to penalize the licensee for its failure to meet the applicant pool standards set forth in the guidelines, or for its inability to document compliance with FCC-approved recruiting procedures. Similarly, the imposition of forfeitures for failure to meet the percentage requirements for applicant pools is unreasonable as applied to licensees operating in markets with low percentages of minorities in the workforce. CBS also submits it is improper to apply the new guidelines retroactively, particularly given that they represent a significant departure from the preexisting standards on which licensees relied and given the substantiality of the penalties provided under them.

It is CBS's view that certain proposals in the Notice for changes in the Commission's EEO policies, rules and procedures will merely place additional burdens on licensees without furthering the Commission's EEO goals. The Commission should continue to focus on full-time employees and not expand its requirements regarding part-time hires, whose relationship to the achievement of EEO goals is attenuated. In addition, the proposed substitution of six new job categories for the present top category on the Broadcast Station Annual Employment Report is unnecessary and burdensome. Finally, no general policy providing for on-site audits should be adopted; such audits should be conducted only when called for by the facts of a specific case.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Commission's April 20, 1994 Notice of Inquiry, FCC 94-103 ("Notice"). The Notice seeks comment on the effectiveness of the Commission's Equal Employment Opportunity ("EEO") rules, procedures, policies, standards and guidelines, on certain "questions and proposals regarding possible changes to the Commission's EEO rules, policies and enforcement thereof", and on "how to further, to the greatest extent possible, the goals of the Commission" in the EEO area. Id. at ¶ 1.

I. THE GUIDELINES ADOPTED IN THE COMMISSION'S RECENT EEO POLICY STATEMENT MAY UNFAIRLY PENALIZE LICENSEES WITH GOOD EEO RECORDS.

In response to the Commission's solicitation of comments on the effectiveness of its EEO policies and on how to further the Commission's goals in the EEO area, CBS deems it appropriate to comment on the Commission's recent Policy Statement establishing guidelines for assessing

forfeitures for violation of the Commission's broadcast Equal Employment Opportunity rules. FCC 94-27 (Adopted January 31, 1994; released February 1, 1994).

CBS's Owned broadcast stations historically have had success in meeting the Commission's equal employment opportunity standards and generally do not anticipate difficulty in meeting the new requirements set out in the guidelines. Moreover, CBS is fully committed to and supportive of the principles of promoting diversity of programming and equal employment opportunity that underlie the Commission's EEO rules.

CBS believes, however, that the newly established guidelines are arbitrary and unfair to the extent that they may operate to impose forfeitures and, in some circumstances, short-term renewals on licensees with good records in employing women and minorities, based merely on the licensee's inability to document its compliance with the guideline's "applicant pool" standards or the Commission's EEO recruitment procedures.

The cornerstone provision of the new guidelines indicates that a base forfeiture of \$12,500 (accompanied by reporting conditions) will be imposed for failure to have an "adequate" pool of minority and female applicants for at least 66% of a licensee's vacancies during the

license term. The guidelines provide for the assessment of a further forfeiture and the possibility of short-term renewal if a licensee fails to have an adequate pool of minority and female applicants for at least 33% of its vacancies in the license term.

Where a licensee's actual record in hiring women and minorities raises questions as to the effectiveness of its EEO program, CBS agrees it is entirely appropriate for the Commission to scrutinize the licensee's efforts to attract minority and female applicants for its job openings. In such circumstances, the Commission clearly should focus on the presence (or absence) of women and minorities in the licensee's applicant pools and on the licensee's outreach efforts.

But where a licensee has a demonstrably good record in hiring women and minorities -- for example, where its hiring or overall employment profile approaches parity with the relevant workforce -- CBS believes it unfair to penalize the licensee for its failure to meet the applicant pool standards set forth in the guidelines, or for its inability to document compliance with FCC-approved recruiting procedures. An EEO program that has a record of success in actually hiring women and minorities speaks for itself; the Commission need not focus on other indicia of the licensee's efforts where a station's employment

record itself shows that those efforts are achieving success. The ultimate goal of an effective EEO program is, of course, a diverse workforce, and particular recruiting procedures are merely a means to this end.

The forfeiture guidelines inexplicably ignore this self-evident point and, in some circumstances, would apparently impose penalties notwithstanding a station's success in actually employing women and minorities. For example, the guidelines appear to mandate forfeitures for failure to meet the applicant pool standards even where a licensee's hiring or employment of women and minorities -- both overall and in the top four employment categories -- approaches or equals 100% of the representation of those groups in the relevant labor force. Indeed, even where a station's hiring and overall employment of women and minorities are both at or above 100% of their representation in the relevant labor force, the guidelines provide only for a downward adjustment of the forfeiture and a presumption against issuance of a short-term renewal. Thus, the guidelines appear to contemplate the imposition of forfeitures, and in some circumstances short-term renewals, even against licensees whose hiring or overall employment of minorities and women effectively mirrors their representation in the local workforce.



Such unreasonable applications of the new guidelines are not simply theoretical. The Commission has already issued a Notice of Apparent Liability for \$25,000, and imposed a short-term renewal and reporting conditions, on a licensee that "hired minorities during the period [examined by the Commission] at a rate equal to 100% of the minority representation" in the relevant labor force. San Luis Obispo Limited Partnership (KKCB/KSLY-FM), FCC 94-21 at ¶ 17, adopted January 31, 1994 and released February 1, 1994.<sup>1/</sup>

CBS respectfully submits that the imposition of sanctions in such circumstances is both arbitrary and unfair. Where a licensee's actual record of employing women and minorities reflects commitment to and success in achieving EEO objectives, it is simply unreasonable to penalize a licensee for being unable to document the presence of an "adequate" number of female and minority candidates in the station's applicant pools.

The forfeiture guidelines also fail to give adequate consideration to the circumstances of licensees operating

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<sup>1/</sup> Unfortunately, San Luis Obispo Limited Partnership does not appear to be an isolated case. See Eagle Broadcasting Company (WHCU(AM)/WYXL(FM), FCC 94-85 at ¶ 35, adopted April 11, 1994; released April 28, 1994 (Notice of Apparent Liability issued for \$6,250 even though "licensee hired or offered to hire minorities in numbers greater than 100% of minority representation in the relevant labor force.")

in markets with small minority populations. As applied to these licensees, the 66% and 33% applicant pool requirements are arbitrary and unreasonable yardsticks for judging EEO performance, since the figures bear no relation to the realities of minority representation in these licensees' markets.

A good example is the Green Bay, Wisconsin market, in which the CBS Owned television WFRV-TV is located. According to 1990 U.S. Census labor force data (on which the Equal Employment Opportunity Branch of the Mass Media Bureau now relies), minorities comprise merely 2.6% of the total civilian workforce in the Green Bay Metropolitan Statistical Area.<sup>2/</sup> It would be highly unfair to expect a licensee in a market with a 2.6% minority workforce to ensure "adequate" minority representation in 66% -- or even 33% -- of its applicant pools, and to impose forfeitures (and possibly even short-term renewals) for its failure to meet these standards.<sup>3/</sup>

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2/ The actual figures reported are 0.2% Black, 0.5% Hispanic, 0.6% Asian, and 1.3% American Indian. See 1990 Census Data Summary Report (P)MSA Total Percentages for Total Civilian Labor Force at 5, March 31, 1993.

3/ We note that WFRV-TV has achieved considerable success in its minority hiring. As reflected in the 1993 Broadcast Station Annual Employment Report for WFRV-TV (and its satellite station WJMN-TV), minority employment in 1993 was 4.8% (4 of 83 employees) -- nearly double the representation of minorities in the workforce.

The Green Bay example illustrates that the forfeiture guidelines fail to account for the realities of markets, whether large or small,<sup>4/</sup> which have small minority populations. CBS submits that it would be manifestly unfair to rigidly apply the guidelines to licensees in such markets.

Finally, for the reasons outlined by the National Association of Broadcasters in its Petition for Reconsideration and Clarification at 9-11 (filed March 3, 1994), CBS believes that application of the new guidelines to judge EEO performance prior to the guidelines' adoption is improper. Congress has made no specific grant of retroactive rulemaking authority here. Retroactive application of the new standards would be unfair since they represent a significant departure from the pre-existing standards on which licensees heavily relied, the penalties under them are substantial, and there is no statutory interest in applying them to past conduct.

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<sup>4/</sup> Since Green Bay is the 65th largest television market, see Broadcasting and Cable Yearbook 1993 at C-213, it should be apparent that the problem with the guidelines is not limited to small markets, as the Notice implies. See Notice at ¶ 21.

II. THE COMMISSION SHOULD REFRAIN FROM ADOPTING PROPOSALS WHICH WILL PLACE ADDITIONAL BURDENS ON LICENSEES WITHOUT FURTHERING THE COMMISSION'S EQUAL OPPORTUNITY GOALS.

In its Notice, the Commission invites comment on a number of specific proposals regarding possible changes to the Commission's broadcast EEO rules, policies and enforcement thereof. With respect to the following proposals, CBS believes that the changes contemplated will not further the Commission's EEO goals, and will simply result in needless additional administrative burdens on licensees.

A. The Commission's Focus Should Remain On Full-Time Staff.

The Notice requests comments on whether and to what extent the Commission should scrutinize EEO efforts relating to part-time hires. As the Notice acknowledges, the "Commission's primary EEO enforcement policies focus on minorities and women employed on a full-time basis." Notice at ¶ 22. This focus on full-time employees is entirely appropriate given the underlying purposes behind the Commission's EEO policies. As stated in the Policy Statement at ¶ 2, the Commission's EEO rules and policies are designed to serve the ultimate "goals of promoting diversity of programming on broadcast stations." It is full-time employees who are central to the operation of broadcast stations and who are likely to influence licensees' programming decisions. See Report and Order, 2

F.C.C. Rcd 3967, 3969-70 (1987) (noting position of specified commentators, including the National Black Media Coalition). Given the attenuated relationship between part-time hires and the Commission's stated EEO goals, the Commission should continue to focus on the efforts of stations to recruit women and minorities for full-time positions in evaluating the effectiveness of their EEO programs.

B. The Commission Has Articulated No Basis For Imposing An Unnecessary And Burdensome Expansion Of Job Categories On The Annual Employment Reports.

The Notice of Inquiry seeks comment on a proposal to expand from nine to fifteen the list of job categories for which employment information is required on the Broadcast Station Annual Employment Report (Form 395-B). Notice at ¶ 29. The contemplated expansion would substitute for the category of "officials and managers" six new categories: "corporate officers", "general managers", "chief technician", "comptroller", "general sales manager", and "production manager".

The Notice articulates no justification for this splintering of one category of top officials and managers into numerous categories, which in most cases encompass only a single position. There is no information significant to the Commission's EEO enforcement obligations reflected in these proposed subcategories

beyond that which will be reflected in the broader category of "officials and managers." Given the absence of any substantive reason<sup>5/</sup> supporting its adoption, this unnecessary and burdensome proposal should be rejected.

C. As a General Matter, There Is No Reason To Conduct On-Site Audits As Part Of The Commission's Renewal Inquiries.

The Notice seeks comments on the question of whether the Commission should "supplement its renewal inquiry procedures by conducting on-site audits in certain [unspecified] cases." Notice at ¶ 27. While it is unclear under what circumstances the Notice contemplates that such an audit might be conducted, we would urge the Commission not to adopt any general practice of conducting such audits. The Notice does not suggest any reason why on-site audits should, as a general matter, be necessary, or indicate what information might be obtained through such audits which would not be more easily available in written form. Therefore, although there may be individual circumstances in which an on-site audit would be warranted, we respectfully submit that such audits should

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5/ The fact that reporting of these fifteen categories is required of cable operators and multichannel video programming distributors (MVPDs) hardly substitutes for a reasoned analysis of whether imposing this additional burden on broadcasters will serve any useful purpose.

be conducted by the Commission only when called for by the facts of a specific case.

#### CONCLUSION

As a broadcaster with a successful record of employing women and minorities, CBS wholeheartedly supports the Commission's EEO goals. CBS also is committed to attracting minority and female applicants for job openings at its Owned stations, and to making affirmative outreach efforts to achieve this objective. CBS submits, however, that the recently adopted EEO guidelines are arbitrary and unfair insofar as they provide for forfeitures and other negative actions based on licensees' failure to meet applicant pool or other procedural requirements, notwithstanding a licensee's success in actually employing women and minorities. The guidelines also fail to adequately consider the circumstances of licensees operating in markets with small minority populations. CBS further submits that retroactive application of these guidelines is improper.

In addition, CBS believes that the proposals specified above regarding possible changes to the Commission's broadcast EEO rules, policies and enforcement should not be adopted.

Respectfully submitted,

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